

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ENFISSION, INC., a Washington
corporation,

Plaintiff,

v.

ERIC LEAVER and JANE DOE LEAVER,
California residents, and the Marital
Community comprised thereof,

Defendants.

CASE NO. C05-0628RSM

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

I. INTRODUCTION

This matter comes before the Court on defendants' Motion to Dismiss. (Dkt. #4). Defendants argue that dismissal of this action is warranted by the *Colorado River* doctrine, which recognizes that federal courts can refrain from exercising their jurisdiction in the interests of judicial administration when parallel proceedings and exceptional circumstances exist. Additionally, defendants contend that venue in federal court is improper pursuant to a non-competition agreement under Federal Rules of Civil Procedure 12(b)(3).

Plaintiff answers that this federal action involves a completely different set of facts and claims from those at issue in the pending state matter, and is therefore not a parallel proceeding. In addition, plaintiff argues that no exceptional circumstances exist that would justify a dismissal

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1 or stay. Plaintiff also argues that defendants' improper venue argument is misguided.

2 For the reasons set forth below, the Court disagrees with plaintiff, and GRANTS
3 defendants' motion for dismissal.

4 **II. DISCUSSION.**

5 **A. Background**

6 Plaintiff Enfission, Inc. ("Enfission"), founded by defendant Eric Leaver ("Leaver") and
7 Riley Livingston ("Livingston") in 2003, is a Washington corporation created for the purpose of
8 developing and marketing a healthy alternative to energy and sports drinks. (Dkt. #4 at 4).
9 Upon formation, Leaver was named President and Chairman of the Board of Directors, and
10 Livingston was named Chief Executive Officer, Secretary, and Treasurer. (Dkt. #4 at 4). A
11 third individual, Brian Winn ("Winn") was added to the Board soon thereafter. (Dkt. #4 at 5).
12 Leaver is the single largest shareholder with a 35.5% stock interest in Enfission, while
13 Livingston and Winn own 30.5% and 19.9%, respectively. (Dkt. #4 at 5).

14 In May of 2004, defendant Leaver allegedly sold 4,000 shares of Enfission stock for a
15 total sales price of \$150,000 to an outside, unrelated third-party. (Dkt. #1 at 2). A rift
16 subsequently developed between Leaver and the other two directors, resulting in Leaver's
17 removal as president and director on February 14, 2005. (Dkt. #7 at 2). As a result, Leaver
18 filed a shareholder derivative action in Snohomish County Superior Court on March 4, 2005
19 against Livingston, Winn, and Biogenesis Nutraceuticals, Inc. ("Biogenesis"), a Washington
20 corporation in which Livingston is a 60% shareholder. (Dkt. #4 at 1 and 5).

21 Defendants in the state action moved for dismissal pursuant to CR 12(b)(6) for failure to
22 state a claim upon which relief can be granted on March 31, 2005. (Dkt. #4 at 2). The motion
23 was denied. (Dkt. #4 at 2). Defendants in the state action also instituted the instant action on
24 March 31, 2005, on behalf of Enfission, against Leaver and his wife. (Dkt #1). Plaintiff raises
25 eight causes of action, including: (1) Injunctive Relief; (2) Declaratory Judgment; (3) Fraud and
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1 Misrepresentation; (4) Conversion; (5) Set Aside Conflicting Interest Transaction; (6) Breach of
 2 Fiduciary Duties; (7) Interference with Business Expectancy; and (8) Tortious Interference.
 3 (Dkt. #1 at 5-10). Defendants now seek to dismiss this case.

4 After defendants filed their motion to dismiss, plaintiff filed a motion for leave to amend
 5 its complaint, seeking to add a ninth cause of action to rescind the stock sale. (Dkt. #6).
 6 Defendants did not respond to plaintiff's motion.

7 **B. The Colorado River Doctrine**

8 In general, federal courts have a “virtually unflagging obligation . . . to exercise the
 9 jurisdiction given them,” even if an action concerning the same matter is pending in state court.
 10 *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976).
 11 However, under certain circumstances, a dismissal or stay of the federal action or claim may be
 12 warranted based on considerations of “[w]ise judicial administration, giving regard to
 13 conservation of judicial resources and comprehensive disposition of litigation.” *Kerotst Mfg.*
 14 *Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). This doctrine, known as the
 15 *Colorado River* doctrine, allows federal courts to abstain from exercising jurisdiction where
 16 “exceptional circumstances” exist.¹ *Colorado River*, 424 U.S. at 818.

17 *1. Parallel Proceedings*

18 Defendants argue that the *Colorado River* doctrine is applicable in the instant case
 19 because a parallel proceeding exists at the state court level. Specifically, defendants contend
 20 that both the state and federal actions revolve around the general mismanagement of Enfission
 21 by its board members. Plaintiff answers that the present action involves claims by Enfission

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 23 ¹ The *Colorado River* doctrine is one of four methods a federal court can utilize to refrain from
 24 exercising jurisdiction under the doctrine of abstention. Courts can also abstain: (1) when a criminal
 25 proceeding is pending, *Younger v. Harris*, 401 U.S. 37, 43-57 (1971); (2) to avoid interfering with
 26 attempts to establish coherent state policy and issues of peculiarly local concern, *Burford v. Sun Oil. Co.*,
 319 U.S. 315, 317-34 (1943); and (3) to avoid unnecessary resolution of a constitutional issue that might
 be mooted by state court construction of a state law. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496,
 498 (1941). These methods of abstention are not before the Court and will not be addressed.

1 against Leaver individually, and does not include the actions of Livingston, Winn, or Biogenesis.

2 Consequently, before considering any “exceptional circumstances,” it is first necessary
3 for this Court to determine whether parallel proceedings exist. *See, e.g., Moses H. Cone Mem’l*
4 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) (recognizing that application of the
5 *Colorado River* doctrine “presumably concludes that the parallel state-court litigation will be an
6 adequate vehicle for the complete and prompt resolution of the issues between the parties”).
7 Parallel proceedings exist when substantially similar parties are contemporaneously litigating
8 substantially similar issues in both the federal and state courts. *See Nakash v. Marciano*, 882
9 F.2d 1411, 1416 (9th Cir. 1989). Suits need not be identical to be parallel, and the mere
10 presence of additional parties or issues in one of the cases will not necessarily preclude a finding
11 that they are parallel. *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698,
12 700-701 (7th Cir. 1992); *see also Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285,
13 1288 (7th Cir. 1988) (noting that the requirement is for parallel suits, not identical ones). Only
14 the existence of a “substantial doubt” that the state proceedings will not resolve the federal
15 action precludes application of this doctrine. *Intel Corp. v. Advanced Micro Devices*, 12 F.3d
16 908, 913 (9th Cir. 1993). Further, a district court may apply *Colorado River* only if it has “full
17 confidence” that the parallel state proceeding will end the litigation. *Gulfstream Aerospace*
18 *Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988).

19 In the instant case, both actions involve “substantially similar issues” as *Nakash, supra*,
20 mandates. For example, both actions arise from a February 14, 2005 meeting where Leaver was
21 removed as President by majority vote of Enfission’s Board of Directors. (Dkts. #1 at 3 and #4
22 at 6). Although plaintiff asserts in its response to defendants’ motion to dismiss that Leaver’s
23 removal is not the basis of its complaint, plaintiff clearly points out that Leaver breached his
24 fiduciary duties after his removal. (Dkts. #7 at 3 and #1 at 3). Specifically, plaintiff avows in its
25 complaint:
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1 15. Since his removal as President of Enfission, the Defendant has improperly
2 retained access [to] Enfission's website and emails by use of an unknown
3 password over which he has not right or legal authority to use.

4 16. In fact, Defendant has improperly refused to give appropriate access to, or
5 authority or control over, Enfission's email, systems, and website to the
6 company's officers and directors, denying Livingston and Winn the full use and
7 control of Enfission's website and emails.

8 ...

9 19. The Defendant has been entering into contracts and commissions with third party
10 vendors and customers of Enfission, without authority to bind Enfission.

11 20. For example, without authorization or approval, and after being dismissed as an
12 officer, Defendant purported to enter a contract on behalf of Enfission, promising
13 to pay commissions to third parties to hand out products in March of 2005 in
14 Southern California.

15 21. Without authorization, Defendant also executed an agreement with a marketing
16 firm, misrepresenting that he had secured significant capital funding for Enfission
17 [resulting in] claims and liabilities in excess of \$100,000.

18 22. Defendant unilaterally and without authorization ordered new shipping boxes,
19 graphic designs and literature for Enfission costing the company in excess of
20 \$15,000, and hurting the company's reputation.

21 23. Defendant without authorization told manufacturers to discard in excess of
22 \$15,000 worth of material and to bill the company because the Defendant simply
23 did not like that design. Defendant failed to seek approval of this, even though
24 new packaging would potentially harm the relationship with Enfission's largest
25 customer.

26 (Dkt. #1 at 3-4).

 The complaint contains other allegations that Leaver acted unilaterally and without
authorization following his removal. Moreover, the complaint is substantially similar to
defendant Leaver's allegations as a plaintiff in the state court action which relate to efforts of
Livingston and Winn to oppress and freeze out Leaver from the management and operation of
Enfission. (Dkt. #4 at 6). As a result, it is evident that substantially similar issues and interests
are being litigated in both the state and federal actions.

 Although plaintiff argues that it lacks standing to raise its claims as counterclaims in the
state action against defendants, this argument is misguided. Generally, a counterclaim may not

1 be asserted in a shareholders' derivative action against the plaintiff shareholder as an individual,
2 since the shareholder brings the action in a representative capacity rather than an individual
3 capacity. *Tryforos v. Icarian Dev. Co.*, 49 F.R.D. 1, 3 (N.D. Ill. 1970); *Higgins v. Shenago*
4 *Pottery Co.*, 99 F. Supp. 522, 524 (W.D. Pa. 1951). But this rule is qualified in actions
5 involving closely held corporations because in these cases the action effectively determines the
6 rights of individuals who have a personal interest in the recovery. *See Burg v. Horn*, 37 F.R.D.
7 562 (E.D. N.Y. 1965) (recognizing that the general principal is hardly without exceptions).
8 Further, a shareholder in a closely held corporation is an "opposing party" for purposes of a
9 counterclaim. *See Berger v. Reynolds Metals Co.*, 39 F.R.D. 313, 315 (E.D. Pa 1966) (holding
10 that a plaintiff bringing a stockholder's derivative suit is an opposing party where he is only one
11 of three major stockholders). In the instant case, Enfission is a closely held corporation
12 comprised of three major stockholders. Therefore, Livingston and Winn would not be
13 precluded from bringing a counterclaim in state court, and this Court has full confidence that all
14 the issues can be adjudicated in the state action.

15 Accordingly, the Court agrees with defendants that this federal action is a parallel
16 proceeding to the state action.

17 2. *Exceptional Circumstances*

18 This Court must next decide whether "exceptional circumstances" exist to warrant
19 abstention. The Supreme Court has articulated four factors for consideration in *Colorado River*:
20 (1) whether a state or federal court has assumed jurisdiction over a *res*; (2) the inconvenience of
21 a federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which
22 jurisdiction was obtained. 424 U.S. at 818. The Court later added two more considerations in
23 *Cone, supra*: (5) whether state or federal law controls the decision on the merits; and (6)
24 whether state law can adequately protect the rights of the parties. 460 U.S. at 24. Another
25 factor mentioned, but not applied by the Court in *Cone*, was the vexatious or reactive nature of
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1 the federal suit. *Id.* at 17 n. 20. Consequently, federal courts have also used that factor in their
 2 analysis for purposes of the *Colorado River* doctrine analysis. *See, e.g., Villa Marina Yacht*
 3 *Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 534 (1st Cir. 1991) (holding that a district court did
 4 not abuse its discretion when considering the reactive nature of the federal claim); *see also*
 5 *Medema v. Medema Builders, Inc.*, 854 F.2d 210, 213 (7th Cir. 1988) (recognizing that the
 6 *Colorado River* doctrine is necessary to “ensure judicial economy and deter abusive ‘reactive’
 7 litigation”). The Ninth Circuit has also added that another factor to consider is forum-shopping.
 8 *American Int’l Underwriters v. Continental Ins. Co.*, 843 F.2d 1253, 1259 (9th Cir. 1988);
 9 *Holder v. Holder*, 305 F.3d 854, 870 (9th Cir. 2002).

10 No single factor in the “exceptional circumstances” test is dispositive, and no mechanical
 11 process is applied. *Cone*, 460 U.S. at 16. Rather, “a carefully considered judgement taking into
 12 account both the obligation to exercise jurisdiction and the combination of factors counseling
 13 against that exercise is required.” *Colorado River*, 424 U.S. at 818-819. Only the clearest of
 14 justifications will warrant dismissal. *Id.* at 819. The doctrine of abstention is ultimately an
 15 “extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy
 16 properly before it.” *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).²

18 a. Jurisdiction over the res

19 The first factor to be considered under the *Colorado River* doctrine is which court first
 20 assumed jurisdiction over the property in dispute. *American Int’l Underwriters*, 843 F.2d at
 21 1257. In the instant case, neither party analyzes this factor because no dispute over the *res* is

23 ² Defendants’ motion to dismiss seeks dismissal of the claim in its entirety, or alternatively, a stay
 24 of those actions in favor of the state court proceedings pursuant to the doctrine of abstention. Although
 25 this distinction is important in terms of the relief provided by this Court, it does not alter the legal
 26 analysis. *See Cone*, 460 U.S. at 28 (recognizing that “a stay is as much a refusal to exercise federal
 jurisdiction as a dismissal”). The legal standard in either case is whether this Court may decline to
 exercise jurisdiction in favor of a parallel state court action. *Id.*

1 involved. Therefore, this factor is not relevant to the Court's instant abstention analysis.

2 b. Inconvenience of the federal forum

3 In assessing the appropriateness of dismissal where concurrent jurisdiction exists, "a
4 federal court may also consider such factors as inconvenience of the federal forum." *Colorado*
5 *River*, 424 U.S. at 818. Plaintiff argues that this factor weighs against abstention because it is
6 more convenient for defendants to litigate in this Court than in Washington State Superior Court
7 for Snohomish County because this Court is closer to "SeaTac Airport and Oakland, California,
8 where Leaver resides." (Dkt. #7 at 9).

9 However, this is not the kind of inconvenience courts envision when examining this
10 factor. *See, e.g., Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368 (9th Cir. 1990)
11 (finding this factor "unhelpful" where one party claimed abstention was proper because the
12 federal court was 200 miles further away than the state court). Furthermore, this factor is
13 typically argued by the party seeking abstention by asserting that the federal forum is
14 inconvenient, not by the party opposing abstention. *See Evanston Ins. Co. v. Jimco, Inc.*, 844
15 F.2d 1185, 1192 (5th Cir. 1988) (holding that the question is not whether the party opposing
16 abstention can demonstrate that the federal forum is a better or more convenient forum, but
17 whether the inconvenience of the federal forum is so great that this factor points towards
18 abstention).

19 Here, the short distance between this Court and Snohomish County Superior Court of
20 approximately 28 miles is too minimal to weigh against abstention.

21 c. The desirability of avoiding piecemeal litigation

22 The avoidance of piecemeal litigation can be an important factor against concurrent
23 federal proceedings. *Colorado River*, 424 U.S. at 819; *see also Holland v. Hay*, 840 F.Supp.
24 1091, 1101 (E.D. Va. 1994) (recognizing that the Supreme Court has referred to the policy of
25 avoiding piecemeal litigation as by far the most important *Colorado River* factor). Piecemeal
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1 litigation arises “when different tribunals consider the same issue, thereby duplicating efforts and
2 possibly reaching different results.” *American Int’l Underwriters*, 843 F.2d at 1258.

3 In the instant case, allowing this action to proceed in this Court runs contrary to the
4 purposes of the *Colorado River* doctrine. Judicial efficiency is promoted not only by allowing
5 the state court to hear the same issues, but also by avoiding the possibility of inconsistent results.
6 Plaintiff maintains that this factor does not weigh in favor of abstention because the state and
7 federal cases are not substantially similar. However, as mentioned above, the same underlying
8 issues permeate both state and federal proceedings. In a closely held corporation comprised of
9 three board members, it would be inefficient for the courts and for the parties involved to litigate
10 this case in two different forums.

11 d. The order in which jurisdiction was obtained

12 The order in which jurisdiction was obtained favors the court that receives notice of a
13 complaint first. However, this factor must be applied in a “pragmatic, flexible manner, so that
14 priority is not measured exclusively in terms of which complaint was filed first, but rather in
15 terms of how much progress has actually been made in the state and federal actions.” *American*
16 *Int’l Underwriters*, 843 F.2d at 1258. Therefore, the threshold question here is whether the
17 state case has substantially progressed beyond initial proceedings. *See Travelers Indem. Co.*,
18 914 F.2d at 1370.

19 The instant action was instituted 27 days after the state action. Although defendants
20 argue that the state action has proceeded far into the discovery stage, discovery has just begun
21 and defendants have not yet replied to interrogatories propounded to him. (Dkt. #8 at 11).
22 While the Court notes that Leaver’s deposition has been conducted in the state proceeding, one
23 deposition can hardly be the “substantial progress” envisioned by the courts when applying this
24 factor. *See, e.g., Nakash*, 882 F.2d 1411 (recognizing that substantial progress had been made
25 where a state court action had been pending for almost five years and over 100 depositions had
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1 been conducted); *see also American Int'l Co.*, 843 F.2d at 1258 (holding that substantial
2 progress had been made where the state court judge had decided seven motions). Nevertheless,
3 the state proceeding has progressed further than the federal proceeding. Thus, this factor
4 weighs slightly in favor of abstention.

5 e. Whether state or federal law controls the decision on the merits

6 Where the claims submitted by a plaintiff are state law claims, the absence of significant
7 federal interests in the action supports abstention, but only in rare circumstances. *See Cone*, 460
8 U.S. at 23 n. 29. Such rare circumstances occur, for example, when a dispute involves
9 important issue of state policy. *See Travelers*, 914 F.2d at 1370 (finding that routine issues of
10 state law such as misrepresentation, breach of fiduciary duty, and breach of contract are issues
11 that district courts are fully capable of deciding).

12 In the instant case, the claims brought by plaintiff are all governed by state law, but
13 involve “routine issues” such as breach of fiduciary duty, fraud and misrepresentation, and
14 tortious interference. The claims do not involve the “rare circumstances” involving important
15 issues of state policy. Therefore, this factor weighs against abstention.

16 f. Whether state law can adequately protect the interests of the parties

17 An additional factor to be considered is whether the state proceeding will protect the
18 rights of the parties involved. *See Cone*, 460 U.S. at 26. As noted previously, plaintiff's
19 interests can and should be adequately protected in the state proceeding given the substantial
20 similarity of the state proceeding to the federal one. Thus, this factor also weighs in favor of
21 abstention.

22 g. Vexatious and reactive nature of the federal claim

23 The Supreme Court recognized that the “vexatious or reactive nature of either the
24 federal or the state litigation may influence the decision whether to defer to a parallel state
25 litigation under *Colorado River*.” *Cone*, 460 U.S. at 17. Where courts find bad faith on the part
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1 of plaintiff, a stay or dismissal may be warranted “as a means to deter vexatious use of the
2 courts.” *Holland*, 840 F. Supp. at 1101; *see also Baseline Sports, Inc.v. Third Base Sports*, 341
3 F. Supp.2d 605, 611-612 (E.D. Va. 2004) (holding that plaintiff brought its claim to district
4 court for a “vexatious” purpose when the claim was a mirror image of the state court action).

5 In the instant case, Livingston and Winn brought this lawsuit on behalf of plaintiff
6 Enfission on the very same day that it filed a motion to dismiss pursuant to Washington Civil
7 Rule 12(b)(6). While the legal strategy of such a decision is not to be questioned by this Court,
8 defendants have made the allegation that this was done for vexatious and reactive purposes to
9 harass and retaliate against defendants. (Dkt. #4 at 17). Plaintiff has offered no response to this
10 allegation, choosing to ignore this factor entirely in its response. Therefore, this factor weighs
11 strongly in favor of abstention.

12 h. Forum-shopping

13 In the *Colorado River* context, forum-shopping is improper when a party “seeks to avoid
14 adverse rulings made by the state court or to gain a tactical advantage from the application of
15 federal court rules.” *Travelers*, 914 F.2d at 1371. However, forum-shopping standing alone
16 does not invoke a stay under *Colorado River*. *Federal Deposit Ins. Corp. v. Nichols*, 885 F.2d
17 633, 638 (9th Cir. 1989).

18 Here, defendants claim this factor weighs in favor of abstention but it has made no
19 concrete showing that plaintiff has improperly engaged in forum-shopping in this case.
20 Defendants cite no specific examples of how plaintiff is gaining a tactical advantage, or is
21 avoiding an adverse ruling in this Court rather than in state court. Therefore, this factor does
22 not weigh in favor of abstention.

23 When weighing all of these factors, it is evident that “exceptional circumstances” exist to
24 warrant abstention under the *Colorado River* doctrine. Although some factors do not weigh in
25 favor of abstention, the test is not to be “mechanically applied.” *Cone*, 460 U.S. at 16.
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1 Furthermore, the underlying rationale of the *Colorado River* doctrine to promote “[w]ise judicial
2 administration, giving regard to conservation of judicial resources” is effectuated by declining
3 jurisdiction in the instant case. *Colorado River*, 424 U.S. at 817. Both the state and federal
4 claims arise from the same underlying dispute after defendant Leaver was removed as President,
5 similar parties in a closely-corporation comprised of only three board-members are involved, and
6 substantially similar issues revolving around the general mismanagement of Enfission are being
7 litigated. Coupled with the vexatious nature of the federal claim, the circumstances weigh
8 heavily in favor of abstention.

9 Additionally, this Court notes that plaintiff’s argument that “it may be discovered that
10 Leaver is infringing or otherwise interfering with Enfission’s copyright . . . which would give
11 rise to exclusive federal claims” is not persuasive. (Dkt. #7 at 7). The mere possibility that an
12 exclusive federal question may exist does not compel this court to grant jurisdiction. State
13 courts have the same obligation to uphold and enforce federal law, and state courts may assume
14 subject matter jurisdiction over a federal cause of action absent a provision by Congress to the
15 contrary or a disabling incompatibility between the federal and state court adjudication. *See*
16 *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-478 (1981); *Tafflin v. Levitt*, 493
17 U.S. 455, 458-460 (1990); *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

18 **C. Venue**

19 Because the Court has determined that dismissal is proper under the *Colorado River*
20 doctrine of abstention, it is not necessary to address the merits of whether dismissal is warranted
21 under Rule 12(b)(3) of the Federal Rules of Civil Procedure.

22 **D. Motion for Leave to Amend Complaint**

23 Because the Court has determined that dismissal is proper, plaintiff’s motion to amend its
24 complaint is now moot.

25 **III. CONCLUSION**

1 Having reviewed defendants' motion to dismiss (Dkt. #4), plaintiff's opposition (Dkt.
2 #7), and defendants' reply (Dkt. #8), the Court hereby GRANTS defendants' motion to dismiss.

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4 DATED this _27__ day of June, 2005.

5
6 /s/ Ricardo S. Martinez
7 RICARDO S. MARTINEZ
8 UNITED STATES DISTRICT JUDGE
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